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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GRANT THORNTON,

Cross-Complainant and Respondent,

v.

BURGH BALIAN & BERGSTEIN et al.,

Cross-Defendants and Appellants.

B209521

(Los Angeles County
Super. Ct. No. BC375820)

APPEAL from an order of the Superior Court of Los Angeles County. Charles Carter Lee, Judge. Affirmed.

Chamberlin Keaster & Brockman and Robert Keaster for Cross-Defendants and Appellants.

Morrison & Foerster, Robert S. Stern, Anthony L. Press and James Oliva for Cross-Complainant and Respondent.

Plaintiffs, who are not parties to this appeal, sued respondent Grant Thornton LLP and others, raising claims related to Grant Thornton’s alleged tax advice and implementation of plaintiffs’ S Corporation Employee Stock Ownership Plans (ESOPs). Grant Thornton cross-complained for equitable indemnity against appellants John Balian and his law firm Burgh Balian & Bergstein LLP (collectively, Balian), among others, for their alleged role in advising plaintiffs with respect to the ESOPs. Plaintiffs did not name Balian in the underlying complaint. This appeal involves Grant Thornton’s cross-complaint against Balian.

Balian filed an anti-SLAPP motion to strike Grant Thornton’s cross-complaint under Code of Civil Procedure section 425.16. The trial court denied the motion and Balian appealed. We conclude the trial court correctly denied Balian’s anti-SLAPP motion. Accordingly, we affirm.

PROCEDURAL AND FACTUAL BACKGROUND¹

Implementation of the ESOPs. In late 2000, plaintiffs Pete Grande and Albert Halimi entered into two agreements, one with defendant Grant Thornton LLP and another with defendant Nevada Corporation Associates, Inc. Under these agreements, Grant Thornton and Nevada Corporation Associates were to implement ESOP tax structures for Grande and Halimi. As part of its agreement, Nevada Corporation Associates created two separate Nevada subchapter S corporations, namely Consolidated Western Holding, Inc. and Consolidated Pacific Holding, Inc. Each of those entities was in turn owned by a newly created ESOP. Defendant Blair Stover (Stover) advised Grande and Halimi that, by using this corporate structure, they could legally avoid state and federal corporate and

¹ The facts are taken from the complaint, cross-complaint and declarations submitted in support of and in opposition to the anti-SLAPP motion. In reviewing the trial court’s ruling on an anti-SLAPP motion, we “consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” (Code Civ. Proc., § 425.16, subd. (b)(2).)

personal incomes taxes. In exchange for implementing the ESOPs, Grande and Halimi paid \$65,000 to Grant Thornton and \$65,000 to Nevada Corporation Associates.

When he first met with Grande and Halimi, Stover was a principal with Grant Thornton and was the person advising Grande and Halimi with respect to the ESOPs. In mid-2001, Stover left Grant Thornton and became a partner with defendant Kruse Mennillo. While with Kruse Mennillo, Stover continued to advise Grande and Halimi with respect to the ESOPs. At some point between late 2000 and the summer of 2001, Stover advised Grande and Halimi that the ESOPs would have to cease operation by 2004.

Legal developments in the field of ESOP tax structures. In 2001, Congress enacted the Economic Growth and Tax Relief Reconciliation Act of 2001. Among other things, this Act created section 409(p) of the Internal Revenue Code (26 U.S.C. § 409(p)), which addressed concerns about tax abuses and ESOP-owned S corporations (like those Stover had set up for Grande and Halimi). Later that year, the United States Tax Court addressed ESOP tax structures in *Beals Brothers Management Corp. v. C.I.R.* (2001) T.C.M. 2001-234 [2001 WL 1057694]. In *Beals Brothers*, the Tax Court concluded that the ESOP operated by the petitioner management corporation did not meet the minimum participation requirements mandated by section 401(a)(3) of the Internal Revenue Code.

Grande and Halimi retain Balian to assist in “winding up” their ESOPs. In light of Stover’s advice concerning the need to cease operation of the ESOPs by 2004, Grande and Halimi sought the advice of Balian. In December 2002, Grande and Halimi retained Balian to assist in closing, or winding up, their ESOPs. On the advice of Balian, Grande and Halimi decided to dissolve the Nevada subchapter S corporations, transfer the funds from each of those S corporations to its ESOP owner, terminate the ESOPs, and finally transfer the funds to Grande and Halimi’s personal IRA accounts. Balian completed these transactions on plaintiffs’ behalf within a two-week period in 2002. In connection with these transactions, Balian had the necessary tax forms completed and filed on behalf of Halimi and Grande, including (i) Nevada corporate dissolution forms,

(ii) IRS Form 5500, Annual Return/Report of Employee Benefit Plan for the year ended December 31, 2002, (iii) Form 1099-R, and (iv) Form 1096.

Grande and Halimi receive IRS audit notifications. On August 12, 2004, the IRS notified Grande and Halimi that it would audit their ESOPs. Before this time, Grande and Halimi were unaware that their ESOP tax structures might be improper.

Grande and Halimi retain Balian with respect to the audits. In September 2004, Grande and Halimi retained Balian to advise them with respect to the IRS audits. Balian was asked to monitor Grant Thornton's response to the audits, provide a second opinion in the event of an IRS settlement offer, and advise Grande and Halimi with respect to the possibility of filing amended California tax returns.

The underlying complaint. Dissatisfied with the advice and services they received from Stover (both while he was with Grant Thornton and Kruse Mennillo) and Nevada Corporation Associates, plaintiffs Grande, Halimi and their companies Command Packaging and Command Packaging, LLC filed suit. Grande, Halimi and their companies sought damages stemming from each of the defendant's alleged roles in relation to the ESOP tax structures. Balian was not named as a defendant in the complaint.

Grant Thornton's cross-complaint. Grant Thornton filed a cross-complaint against Balian and others. As against Balian, Grant Thornton alleged a cause of action for equitable indemnity, claiming that, in the event plaintiffs were to be successful on their claims against Grant Thornton, Balian would be responsible for a large portion of any such damages. Specifically, Grant Thornton claimed that it was Balian's 2002 advice regarding the transfer of S Corporation funds that caused the bulk of plaintiffs' damages as alleged in the underlying complaint.

Balian filed an anti-SLAPP motion to strike the cross-complaint. The trial court denied the motion, and Balian appealed.

DISCUSSION

Standard of Review. “Review of an order granting or denying a motion to strike under section 425.16 is de novo.” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3 (*Soukup*).) “We consider the ‘pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.’ (Code Civ. Proc., § 425.16, subd. (b)(2).) However, we neither ‘weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.’” (*Ibid.*, quoting *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.)

Anti-SLAPP motions under Section 425.16. Under Code of Civil Procedure section 425.16, a party may move to dismiss “certain unmeritorious claims that are brought to thwart constitutionally protected speech or petitioning activity.” (*Robinzine v. Vicory* (2006) 143 Cal.App.4th 1416, 1420-1421.) Section 425.16 provides: “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. (Code Civ. Proc., § 425.16, subd. (b)(1).)

In evaluating an anti-SLAPP motion, we conduct a two-step analysis. First, we must decide whether the defendant “has made a threshold showing that the challenged cause of action arises from protected activity.” (*Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 488 (*Taheri*).) For these purposes, protected activity “includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in

furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (Code Civ. Proc., § 425.16, subd. (e).)

If the defendant makes this threshold showing, we then decide whether the plaintiff (or cross-complainant, as is the case here) “has demonstrated a probability of prevailing on the claim.” (*Taheri, supra*, 160 Cal.App.4th at p. 488.)

Step One: The Cross-Complaint against Balian does not arise from protected activity. Section 425.16 requires “that the subject cause of action is in fact one ‘arising from’ the defendant’s protected speech or petitioning activity.” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66.) “[T]he statutory phrase ‘cause of action . . . arising from’ means simply that the defendant’s act underlying the plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff’s cause of action itself was *based on* an act in furtherance of the defendant’s right of petition or free speech. [Citations.] ‘A defendant meets this burden by demonstrating that the act underlying the plaintiff’s cause [of action] fits one of the categories spelled out in section 425.16, subdivision (e).’ . . . [Citations.]” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) “[T]he mere fact an action was filed after protected activity took place does not mean it arose from that activity.” (*Id.* at pp. 76-77.) “That a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such.” (*Id.* at p. 78.)

a) The act underlying Grant Thornton’s cross-claim against Balian is Balian’s 2002 advice to Grande and Halimi.

The pleadings and evidence submitted by the parties in connection with the motion establish that Grant Thornton’s cross-complaint against Balian for equitable indemnity does not arise from protected activity for purposes of the anti-SLAPP statute. For present purposes, we are not concerned with the title of Grant Thornton’s cross-claim against Balian. Whether it is a claim for legal malpractice or one for equitable indemnity, our task is to consider the act underlying the cause of action. (*City of Cotati v. Cashman*,

supra, 29 Cal.4th at p. 78.) Here, the gravamen of Grant Thornton’s cross-claim is that, to the extent plaintiffs were damaged, Balian’s 2002 advice to plaintiffs caused a significant portion of those damages. Thus, the act underlying the cross-claim is Balian’s 2002 advice to plaintiffs, which concerned the “winding up” of the ESOPs.

b) Balian’s 2002 advice does not qualify as protected activity under Section 425.16, subdivision (e)(1).

Balian’s 2002 advice does not “fit [any] of the categories spelled out in section 425.16, subdivision (e)” and, therefore, is not protected activity for purposes of the anti-SLAPP motion. (*City of Cotati v. Cashman*, *supra*, 29 Cal.4th at p. 78.) First, the 2002 advice was not a “written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law.” (Code Civ. Proc., § 425.16, subd. (e)(1).) Balian argues that the counterclaim falls within this subdivision (e)(1) because he filed forms on behalf of plaintiffs with the IRS and FTB. We are not persuaded. Although Balian filed tax forms on behalf of plaintiffs, Grant Thornton is not cross-claiming against Balian based on the filing of tax forms. Rather, as explained, the gravamen of the cross-complaint is Balian’s 2002 advice and counseling of plaintiffs with respect to the “winding up” of the ESOP plans.

Moreover, Balian cites no authority for the proposition that simply filing required tax forms constitutes protected activity for purposes of an anti-SLAPP motion. As Grant Thornton points out, in those cases in which courts have concluded the filing of a complaint, letter, or form, for example, with a government agency constituted protected activity for purposes of an anti-SLAPP motion, the conduct complained of was intended to trigger an investigation by a government agency. (E.g., *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1009 [filing a complaint with the SEC prior to an investigation qualifies as protected activity where “the purpose of the complaint was to solicit an SEC investigation”].) Similarly, our Supreme Court has held that the analogous privilege under Civil Code section 47 applies to conduct designed to trigger an official

proceeding or investigation.² (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 368; see also *Tiedemann v. Superior Court* (1978) 83 Cal.App.3d 918, 926 [privilege under Civil Code section 47 applied to communication made to IRS that was “designed to prompt regulatory enforcement action”].)

In contrast, here, Balian did not file forms with the IRS or FTB in order to trigger an investigation by either the IRS or FTB. Indeed, we would think neither Balian nor his clients would want to prompt an investigation. Rather, Balian filed those forms because they were necessary and required to be filed. Accordingly, Balian’s filing of tax forms does not bring this case within the ambit of Section 425.16, subdivision (e)(1). (See *Moser v. Triarc Companies, Inc.* (S.D. Cal.) 2008 WL 2705159 [concluding section 425.16 did not bar complaint because conduct complained of (the filing of Form S-1 with the SEC) was not aimed at triggering an SEC investigation].)

c) *Balian’s 2002 advice does not qualify as protected activity under section 425.16, subdivision (e)(2).*

Second, Balian’s 2002 advice was not a “written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.” (Code Civ. Proc., § 425.16, subd. (e)(2).) Balian argues that the cross-claim falls within this subdivision (e)(2) because he filed forms on behalf of plaintiffs with the IRS and FTB and provided advice to plaintiffs “in connection with a potential audit, which did in fact occur.” Again, we are not persuaded. As we have explained, Grant Thornton’s cross-complaint against Balian is not premised on his filing of tax forms, nor is it premised on any advice Balian might have given plaintiffs with respect to the IRS audit of the ESOP plans. Rather, the cross-complaint is premised on Balian’s 2002 advice, which was not given “in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.”

² See *ComputerXpress, Inc. v. Jackson*, *supra*, 93 Cal.App.4th at page 1009 (noting that section 425.16, subdivision (e)(1) is analogous to Civil Code section 47).

The IRS did not issue its audit letters with respect to the plaintiffs' ESOP plans until August 2004. In fact, plaintiff Halimi stated he was unaware of any problems with the ESOPs when they first retained Balian. Halimi stated he was not aware of any problem with the ESOP plans "until the audit" in 2004. Also, in his declaration, Balian stated that, beginning approximately in September 2004, and after Grande and Halimi had received the IRS audit notices, he "was further engaged" by Grande and Halimi to perform additional services specifically related to the audits. These services are clearly different in kind than those required under Balian's December 2002 engagement agreement with plaintiffs, which centered on winding up the ESOPs.

Balian relies on the 2001 enactment of section 409(p), of the Internal Revenue Code and the United States Tax Court's issuance of its memorandum decision in *Beals Brothers Management Corp. v. C.I.R.*, *supra*, T.C.M. 2001-234 to argue that his 2002 advice with respect to the ESOPs was "made in connection with an issue under consideration or review" for purposes of section 425.16, subdivision (e)(2). We reject this reading of subsection (e)(2). To accept Balian's argument would be to ignore the words "in connection with" as used in section 426.16, subdivision (e)(2). Although Balian asserts the required connection may be "slight" or "incidental," we fail to see any connection between Balian's 2002 advice, on the one hand, and Congress' enactment of Internal Revenue Code section 409(p), or the Tax Court's *Beals Brothers* decision, on the other hand. Although Congress, the Tax Court and Balian may have addressed similar issues (namely, the apparently evolving law surrounding ESOPs), this is insufficient to satisfy the connection required by section 425.16, subdivision (e)(2).³

³ Balian also asserts that, when he met with Grande and Halimi in 2002, he knew the 2004 IRS audit was "more likely than not to occur" and, therefore, his 2002 advice was in anticipation of and related to the audit. First, this assertion is not supported by the record before us. Moreover, mere knowledge of the possibility of a subsequent audit is insufficient to bring earlier advice within the protection of section 425.16.

d) The litigation privilege does not bar Grant Thornton's cross-claim against Balian.

The litigation privilege of Civil Code section 47, subdivision (b), does not help Balian. Balian argues that, if the litigation privilege applies to the conduct at issue in the cross-complaint, then that conduct is protected activity for purposes of the anti-SLAPP motion. In order for the litigation privilege to apply, the moving party must demonstrate that the communication at issue: (i) was made in a judicial or quasi-judicial proceeding, (ii) was made by litigants or other participants authorized by law, (iii) was made to achieve the objects of the litigation, and (iv) has some connection or logical relation to the action. (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241.)

Balian appears to argue that the litigation privilege bars the cross-complaint because his 2002 advice and his filing of tax forms on behalf of Grande and Halimi were done in anticipation of the 2004 IRS audit. We have already concluded, however, that, based on the record before us, Balian has not demonstrated that his 2002 advice was connected to the 2004 audit. As a result, Balian does not satisfy the fourth element of the litigation privilege. We are similarly not persuaded that, simply by filing necessary forms with the IRS and FTB, Balian has satisfied the first requirement of the litigation privilege. The cases Balian relies on do not change our analysis. (See, e.g., *Action Apartment Assn., Inc. v. City of Santa Monica*, *supra*, 41 Cal.4th at p. 1232; *Rohde v. Wolf* (2007) 154 Cal.App.4th 28; *Tiedemann v. Superior Court*, *supra*, 83 Cal.App.3d at p. 918.) Because Balian does not satisfy at least two of the elements required for application of the litigation privilege, we do not address the remaining elements of the privilege.

Step Two: We do not reach step two of the analysis. Because we conclude Grant Thornton's cross-claim against Balian does not involve protected activity for purposes of Balian's anti-SLAPP motion, we do not reach the parties' arguments as to whether the cross-claim has minimal merit.

Request for Judicial Notice. In connection with this appeal, Balian filed a Request for Judicial Notice. Balian seeks judicial notice of two stipulations—one between the IRS and plaintiff Halimi and his wife, the other between the IRS and plaintiff Grande and his wife. The stipulations were executed in October 2008. While Grant Thornton disputes the effect the stipulations may have on this appeal and litigation in general, Grant Thornton does not oppose the request for judicial notice. The request for judicial notice is granted. But, because we do not reach step two of the anti-SLAPP analysis, we do not address the effect, if any, the judicially noticed documents might have on this litigation.

DISPOSITION

The trial court order dated May 19, 2008 is affirmed on the ground that Grant Thornton’s cross-claim against Burgh Balian & Bergstein and John Balian does not arise from protected activity under Code of Civil Procedure section 425.16.

NOT TO BE PUBLISHED.

TUCKER, J.^{*}

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

^{*} Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.